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“Sustainable global supply chains: From transparency to due diligence”

Kasey McCall-Smith¹ and Andreas Rühmkorf²

I. INTRODUCTION

In recent years, global supply chains have repeatedly been in the spotlight for both recurring labour violations and gross violations of human rights at supplier factories and other sourcing points. The sites of the human rights abuses are often located in countries in the developing world with weak laws and/or weak law enforcement mechanisms. In these settings, transnational corporations³ (TNCs) tend to wield a great deal of power due to the potential economic development for the host state. The combination of strong private business interests and weak governance results in a power imbalance that often sacrifices human rights protections for individuals and sustainability objectives, such as decent work and reduced inequalities, in order to maximise the economic value of the TNC's operation. This imbalance has borne increasing negative publicity for TNCs that have failed to address many of the worst abuses of employees and stakeholders in their supply chains. Due to growing public pressure over the past decades and to avoid reputational damage, TNCs often seek to address questionable business practices through voluntarily adopted corporate social responsibility (CSR) initiatives. However, reports about human rights violations and environmental and sustainability concerns are recurrent.⁴ Therefore, discussions at both international and national levels are increasingly focusing on the topic of supply chain due diligence as a way to better promote responsible behaviour.

Following international law approaches to addressing CSR in global supply chains, there are now variable legislative measures designed to ensure sustainable supply chains. A number of these measures focus on the due diligence obligations of TNCs based in the home state's jurisdiction. This trend is partly due to the UN Guiding Principles on Businesses and Human Rights (UNGPs) and its emphasis on business fulfilling due diligence as part of its responsibility to respect human rights as well as the focus on due diligence by a variety of

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³ Transnational corporations (TNCs), business, corporations and corporate actors will be used interchangeably throughout.

⁴ See the Business & Human Rights Resource Centre (BIHR) website <<https://www.business-humanrights.org/en/find-companies>> accessed 25 May 2018.

other CSR frameworks.⁵ The different legislative measures have varying levels of stringency and varying effects on corporate behaviour in terms of sustainable supply chains. This study focuses on the role of transparency legislation, namely the UK Modern Slavery Act and the US Dodd-Frank Act on conflict minerals, in supporting effective human rights due diligence in the management of sustainable supply chains.

This chapter will combine public international law perspectives on human rights due diligence in global supply chains with domestic law approaches. The paper will first navigate the meaning and scope of the concept of sustainability and due diligence in global supply chains. It will then explore due diligence from a public international law perspective by focussing on the concept in general international law as well as the most relevant soft law standards set down in the UN Guiding Principles on Business and Human Rights and by the Organisation for Economic Co-operation and Development (OECD). Finally, the chapter will critically engage with the domestic legislation intended to ‘harden’ the international human rights due diligence standards. It will consider the coherence of the governance mechanisms in the implementation of the identified transparency measures and consider if the means selected rectifies the power imbalance between the potential harm and the method of deterrence. It is intended that this chapter will contribute to the growing literature on due diligence in supply chain management in the field of business and human rights.

II. SUSTAINABLE SUPPLY CHAIN MANAGEMENT AND ITS GOAL

The concept of ‘sustainability’ has a range of meanings and applications. Generally, this collection of essays subscribes to an understanding of sustainability as: ‘Development that meets the needs of the present while safeguarding Earth’s life-support system, on which the welfare of current and future generations depend.’⁶ In the context of supply chain management, the definition must be more fully defined. The term ‘sustainability’ is used as a synonym for CSR or ‘socially responsible’ almost as frequently as it is defined as a separate

⁵ John Ruggie, Final Report introducing the Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework, UN Doc A/HRC/17/31 (21 March 2011) (Final Report).

⁶ David Griggs, et al, ‘Sustainable Development Goals for People and Planet’ (2013) 495 Nature 305, 306, noting the definition was laid out in a report by the 1987 UN World Commission on Environment and Development (The Brundtland Commission) report ‘Our Common Future’ <<http://www.un-documents.net/our-common-future.pdf>> accessed 25 May 2018.

concept.⁷ This chapter will treat the terms ‘sustainable’ and ‘socially responsible’ as interchangeable, envisaging that protection of human rights is necessary to achieving both..⁸ As will be examined below, a necessary feature of sustainable supply chain management is transparency. Without a clear picture of the complete supply chain, the potential to guard against potential abuse is not possible. Thus whether articulating the discussion under ‘sustainable’ or ‘socially responsible’ supply chain management, the necessity to examine transparency is the same.

As the 2030 Sustainable Development Goals (SDGs) continue to serve as the goal-setting standards for public and international policy development, the legal community must negotiate how law can further entrench the vision of a more just and sustainable future.⁹ The aim of this chapter is to evaluate the extent to which transparency regulations fulfil due diligence requirements as understood in both international and national law perspectives as a means of ensuring sustainability. To develop our conclusion, we engage with debates on the implementation of the most commonly recognised international laws and soft CSR standards focused on supply chains. In terms of global supply chains and their management, it is more important to clarify what *goal* is intended through the achievement of a ‘sustainable’ or ‘responsibly managed’ supply chain.

There are very few of the SDGs that are not affected by business activity. Supply chain activity, in particular, has an equal opportunity to push the UN development agenda both forward and backward. Considering the most common complaints against poorly managed supply chains and the human rights abuses resulting therefrom, it seems clear that sustainable

⁷ The Institute for Human Rights and Business (IHRB) uses the terms interchangeably, see Sune Skadegaard Thorsen, ‘Are Current Approaches to Responsible Supply Chain Management Working?’ (*IHRB*, 12 August 2010) <<https://www.ihrb.org/focus-areas/commodities/commentary-current-approaches-responsible-supply-chain-management-working>> accessed 25 May 2018; Robert Strand, R Edward Freeman and Kai Hockerts, ‘Corporate Social Responsibility and Sustainability in Scandinavia: An Overview’ (2015) 127 *Journal of Business Ethics* 1, 2. Strand et al suggest that ‘sustainability’ is, in some instances, increasingly preferred over CSR while others note that the term’s use is dependent on the field. See Kate Fitch, ‘Public Relations and Responsible Citizenship: Communicating CSR and Sustainability’ in Martin Brueckner, Rochelle Spencer and Megan Paull (eds), *Disciplining the Undisciplined? CSR Sustainability, Ethics & Governance* (Springer 2018) 112 *et seq*.

⁸ This is done for purposes of simplicity noting that the focus of this chapter is not to define the concept but to generate views as to how sustainability is achieved.

⁹ UN General Assembly, Resolution 70/1. Transforming our world: the 2030 Agenda for Sustainable Development, UN Doc A/Res/70/1 (25 September 2015).

supply chains could aid in delivering the following SDGs: SDG 1 No poverty; SDG 3 Good health and well-being; SDG 5 Gender equality; SDG 6 Clean water and sanitation; SDG 8 Decent work and economic growth; SDG 9 Industry, innovation and infrastructure; SDG 10 Reduced inequalities; and SDG 16 Peace, justice and strong institutions.¹⁰ Poor supply chain management, for example, often facilitates low-paid work (SDG 1) in substandard working conditions (SDG 8), which can exacerbate ill health (SDG 3). It is therefore imperative that states and business fully appreciate the role that supply chains play in helping or hindering these and best paths for achieving progress toward the SDGs. It is negotiating the relationship between states and businesses in the area of human rights that has proved the largest impediment to progressing sustainability in supply chains.¹¹ Heretofore, the bulk of this relationship has been addressed through voluntary CSR schemes. While the voluntary nature is often criticised, the varying standards are beginning to coalesce to deliver a clearer picture of what sustainable business practice means and how to achieve it.

The UN Global Compact is the widest reaching voluntary international CSR initiative.¹² The Compact sets out a minimum level of social and environmental standards for business activities through its Ten Principles with 161 States and over 12.000 businesses/non-business partners in its network.¹³ The Principles explicitly note that businesses should support and respect human rights, not be complicit in the breach of human rights, and specifically uphold the freedom of association, the elimination of forced and compulsory labour, the abolition of child labour and the elimination of discrimination, all of which contribute to the realisation of SDG 8 on decent work and economic growth.¹⁴ To guide business in upholding these principles at every stage of the value chain, the Compact identifies five things that businesses must do to be sustainable, including: ‘operating responsibly in alignment with universal principles and take actions that support the society around them. Then...commit at the highest level, report annually on their efforts, and engage locally where they have a

¹⁰ Though an argument could be made that all 17 SDGs are in some way impacted by the large variety of supply chains.

¹¹ See generally Radu Mares, ‘The Limits of Supply Chain Responsibility – A Critical Analysis of CSR Instruments’ (2010) 79 *Nordic Journal of International Law* 193.

¹² UN Global Compact <<https://www.unglobalcompact.org/>> accessed 25 May 2018. For a comprehensive examination of the Global Compact, see Radu Mares, ‘The Limits of Supply Chain Responsibility – A Critical Analysis of CSR Instruments’ (2010) 79 *Nordic Journal of International Law* 193, section 3.3.

¹³ Ten Principles of the UN Global Compact <<https://www.unglobalcompact.org/what-is-gc/mission/principles>> accessed 25 May 2018.

¹⁴ *Ibid.*, Principles 1 – 6.

presence.¹⁵ Collectively, this forms the basis of a comprehensive due diligence policy designed to support sustainable supply chains by incorporating a social dimension that will be explored further in the following section.

III. HUMAN RIGHTS AND DUE DILIGENCE - CONNECTING THE DOTS

Due diligence has been defined as ‘an obligation to exercise reasonable care’.¹⁶ Corporations have historically employed due diligence analysis across all business operations in order to assess the potential risks of business decisions, a process which is fundamental to protecting business interests. More recently, the concept has been offered through a range of international CSR frameworks as a response to questions about how to deliver sustainable supply chains, particularly in relation to conflict minerals in states such as the Democratic Republic of the Congo (DRC).¹⁷ Unlike previous business interest-focused examinations of the supply chain, centred on economic and delivery concerns, contemporary due diligence considerations must account for social or human rights impacts if business activity is to contribute to the attainment of the SDGs. Including human rights due diligence is a key element to ensuring a sustainable supply chain as human capital is the backbone of each and every supply chain. But how is human rights due diligence to be achieved in supply chains?

A. Defining Human Rights Due Diligence

Due diligence is a long-accepted dimension of various fields of international law, most notably diplomatic protection and environmental law.¹⁸ Human rights due diligence (HRDD) is a broad concept that includes ‘the process of identifying human rights impacts, taking actions to prevent, mitigate and account for any such impacts and monitoring the

¹⁵ UN Global Compact, Guide to Corporate Sustainability: Shaping a Sustainable Future (December 2014), 7

<https://www.unglobalcompact.org/docs/publications/UN_Global_Compact_Guide_to_Corporate_Sustainability.pdf> accessed 25 May 2018.

¹⁶ *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd* [1960] 1 All ER 193 at para 219 (Willmer LJ).

¹⁷ See generally Olga Martin-Ortega, ‘Human Rights Due Diligence for Corporations: From Voluntary Standards to Hard Law at Last?’ (2013) 31:4 Netherlands Quarterly of Human Rights 44.

¹⁸ Robert P Barnidge, Jr, ‘The Due Diligence Principle under International Law’ (2006) 8 International Community Law Review 81, 92, citing, for example, *Janes (US v Mexico)*, 4 R.I.A.A. 82 (1926); *Youmans (US v Mexico)*, 4 R.I.A.A. 110 (1926); Trail Smelter Arbitral Tribunal, Decision, Reported on 11 March 1941, to the Government of the United States of America and to the Government of the Dominion of Canada, Under the Convention Signed 15 April 1935, (1941) 35 AJIL 684.

effectiveness of actions taken.¹⁹ HRDD developed in close association with the principle as understood in environmental law. The late 1990s focus on ensuring against harm caused by a natural or manmade disaster that might impact environmental rights tracked arguments for holding the state responsible when it failed to prevent human rights abuse against individuals by third parties.²⁰ In both instances it was not entirely clear how the state could protect against harm. This mandate suggests that the state must have some prior knowledge that the potential harm exists and be prepared to deal with the harm from a legal, administrative and logistical standpoint. If the state had some prior knowledge, then the question becomes *could* have the state prevented the harm? This was precisely the point raised by the 1993 UN Declaration on the Elimination of Violence against Women²¹ and the 1995 Beijing Declaration and Platform for Action.²² Thus in the early 1990s the groundwork was laid for considering what specific duty was on the state to prevent harm across a range of issues, including those raised by the business and human rights relationship.²³ The question remains today when considering how states regulate to prevent harm in supply chains.

¹⁹ Robert McCorquodale, Lise Smit, Stuart Neely and Robin Brooks, 'Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises' (2017) 2 Business and Human Rights Journal 195, 205.

²⁰ Andrew Clapham, *Human Rights in the Private Sphere* (Clarendon 1993), 120; See *X and Y v the Netherlands* (1985) 8 EHRR 235; *Velásquez-Rodríguez v Honduras* (Merits), Ser. C, No. 4 (1988), paras 172-5, the Inter-American Court of Human Rights opined that the failure to prevent harm by a third party triggered the international responsibility of the state; reaffirmed *Ximenes-Lopes v. Brazil*, Ser. C, No. 149 (2006); See also, African Commission for Human Rights, Application No. 55/96, *SERAC and CESR v. Nigeria*, 15th Annual Report of the ACHPR [2002] 10 IHRR 282 (2003), where the obligation of the state to prevent human rights abuse by third parties was recognized.

²¹ UN Declaration on the Elimination of Violence against Women, G.A. Res. 48/104, UN Doc. A/RES/48/104 (20 December 1993), art 4(d). Yakin Ertürk, Integration of the human rights of women and the gender perspective: violence against women. Report of the Special Rapporteur on violence against women, its causes and consequences, UN Doc E/CN.4/2006/61/Add.4 (13 January 2006); for a general summary of the history of due diligence in relation to domestic violence, see Lee Hasselbacher, 'State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence, And International Legal Minimums of Protection' (2010) 8 Northwestern Journal of International Human Rights 190.

²² Beijing Declaration and Program for Action (15 September 1995) <<http://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf>> accessed 25 May 2018.

²³ There were failed attempts to articulate the business and human rights relationship in a legally binding context, such as the UN Norms on the Responsibilities of Transnational

To fulfil this duty, public international law relied upon the long-standing private law concept of risk analysis, a process universally practiced by corporations prior to entering a contract, and transposed this concept into the public international legal system by applying it to states in the form of a ‘due diligence’ obligation.²⁴ The term in the 1990s was generally understood to involve ‘concepts of duty and failure to exercise due care...though views differ[ed] as to whether knowledge of the risk [was] required, or just foreseeability.’²⁵ Applying due diligence obligations to states requires the development of international, regional and national legal apparatus to give them effect.²⁶ At the international level, due diligence is also the standard used to determine a breach by a state of an international obligation.²⁷ That obligation, however, is limited to an obligation owed to another state, not to the human components of a supply chain. To ensure accountability, national legal systems must also impute due diligence obligations to private actors, including corporations.

b. Supply Chain Due Diligence

In international law, explicit reference to sustainable supply chain due diligence for purposes of CSR (including human rights) is made in three principal documents: the UNGPs,²⁸ the Organisation for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises (OECD Guidelines for MNEs)²⁹ and the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk

Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc E/CN.4/Sub.2/2003/38/Rev.2.

²⁴ Martin-Ortega n 17, 46.

²⁵ Stephanie Farrior and Brice Clagett, ‘State Responsibility for Human Rights Abuses by Non-State Actors’ (1998) 92 Proceedings of the Annual Meeting of the American Society of International Law (1-4 April 1998), 299, 302.

²⁶ Much of this work was carried out as part of the International Law Commission’s extensive studies on state responsibility. For analysis of the ILC work, see discussion in Barnidge (2006).

²⁷ Martin-Ortega n 17, 52.

²⁸ UN Guiding Principles on Business and Human Rights, UN Doc A/HRC/17/31 (21 March 2011) annex (UNGPs).

²⁹ OECD, *Guidelines for Multinational Enterprises* (OECD Publishing 2011) (*OECD Guidelines for MNEs*) <<http://www.oecd.org/daf/inv/mne/48004323.pdf>> accessed 25 May 2018. The UNGPs were incorporated explicitly into the *Guidelines for MNEs*. Due diligence is one of the key general policies, see Ch II, paras 10, 14, 15; Ch IV para 5 and commentary (specifically on human rights due diligence); Ch VII para 4 (on combatting bribery, bribe solicitation and extortion).

Areas (OECD Due Diligence Guidance).³⁰ These are used as a point of reference for a growing number of international corporate social responsibility policies.³¹ This section will briefly examine how these two sets of guidelines understand and advance due diligence by TNCs as the background to the subsequent assessment of home state laws.

i. The UNGPs

The UNGPs set standards on business and human rights, which were endorsed by the UN Human Rights Council in 2011.³² They do not impose any legal obligations onto business actors, but elaborate the implications of existing standards and practices for states and businesses.³³ In the UNGPs, human rights due diligence is a recurrent feature and is predominantly addressed toward corporations in terms of their responsibility to respect human rights. Appreciating the ‘sphere of influence’ is an essential consideration and is

³⁰ OECD, Recommendation of the Council on Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, C/MIN(2011)12/FINAL (25 May 2011). See discussion in John G Ruggie, ‘The Social Construction of the Guiding Principles on Business and Human Rights’ Corporate Responsibility Initiative Working Paper No. 67, Harvard University (2017), 18 <https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/workingpaper_67_0.pdf> accessed 25 May 2018.

³¹ See, for example, Sune Skadegaard Thorsen and Soeren Jeppensen, Global CSR and Copenhagen Business School for the Danish Ministry, *Changing Course – A Study into Responsible Supply Chain Management*, January 2011, 9. <<http://docplayer.net/amp/14919639-Main-report-changing-course-a-study-into-responsible-supply-chain-management.html>> accessed 25 May 2018; Ruggie n 30 2.

³² UN Human Rights Council (UNHRC), Resolution 17/4, UN Doc A/HRC/RES/17/4 (16 June 2011). The endorsement of the UNGPs by the HRC was viewed by many as a ‘watershed moment’ in the business and human rights relationship, see The Economist Intelligence Unit, *The Road from Principles to Practice: Today’s Challenges for Business in Respecting Human Rights* (2015) <<https://www.eiuperspectives.economist.com/strategy-leadership/road-principles-practice>> accessed 25 May 2018; Ruggie) n 30; César Rodríguez-Garavito, ‘Business and Human Rights: Beyond the End of the Beginning’ in César Rodríguez-Garavito (ed), *Business and Human Rights: Beyond the End of the Beginning* (CUP 2017); Stephanie Lagoutte, ‘The UN Guiding Principles on Business and Human Rights: A Confusing “Smart Mix” of Soft and Hard International Human Rights Law’ in Stephanie Lagoutte, Thomas Gammeltoft-Hansen and John Cerone (eds), *Tracing the Role of Soft Law in Human Rights* (OUP 2016); Astrid Sanders, ‘The Impact of the “Ruggie Framework” and the United Nations Guiding Principles on Business and Human Rights on Transnational Human Rights Litigation’ in Jena Martin and Karen E Bravo (eds), *The Business and Human Rights Landscape: Moving Forward, Looking Back* (CUP 2015); Stephanie Lagoutte, ‘New Challenges Facing States within the Field of Human Rights and Business’ (2015) 33:2 Nordic Journal of Human Rights 158.

³³ Ruggie, Final Report, para 14; Ruggie n 30, 1.

particularly key in relation to supply chain management.³⁴ According to Principle 17, HRDD should ‘cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships’. All components of the supply chain are undoubtedly linked to operations, products and, potentially, services. Principles 18 to 21 are more specific. First, principle 18 notes that ‘business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships,’ in other words, business should carry out a human rights impact assessment and this should extend to all business relationships, including those forming the supply chain. Human rights impact assessments and their effectiveness is an increasing focus of business and human rights literature and is generally considered the crucial first step in HRDD.³⁵ Principle 19 further outlines that business should ‘integrate the findings from their impact assessments across relevant internal functions and processes, and take appropriate action’ and principle 20 recommends that ‘business enterprises should track the effectiveness of their response’ as a means to verify whether adverse human rights impacts are being addressed. Finally, Principle 21 suggests that ‘in order to account for how they address their human rights impacts, business enterprises should be prepared to communicate this externally’. This is the basis of the transparency element of due diligence in supply chains. In summary, Principles 18 to 21 outline the different elements of a human rights due diligence process, starting with an identification and assessment of risk at the beginning, to the integration of the findings into internal functions and the taking of appropriate action, to an assessment of the effectiveness of the action taken (verification) and transparent communication of this process. While phrased entirely in terms of human rights, the UNGPs set standards vital to social sustainability, as noted above.

In the wake of the UNGPs, the Office of the UN High Commissioner for Human Rights also delivered an Interpretive Guide on the UNGPs, which includes the meaning of due diligence

³⁴ UN Protect, Respect and Remedy: a Framework for Business and Human Rights, UN Doc A/HRC/8/5 (7 April 2008) paras 65-72.

³⁵ Nora Götzmann, ‘Human Rights Impact Assessment of Business Activities: Key Criteria for Establishing a Meaningful Practice’ (2017) 2 Business and Human Rights Journal 87.

in the business and human rights context.³⁶ The High Commissioner's Interpretative Guide also highlights that transparency is necessary to maintain credibility and a key principle for contracts.³⁷ In further elaboration of UNGP 21, the Guide clarifies that business enterprises with a high risk of a human rights impact should report in an appropriate public forum, while those with 'lesser human rights risk profiles' will strengthen their reputation by being more transparent.³⁸

ii OECD Standards

Further important non-UN standards in the context of due diligence and supply chains is that developed by the OECD. The OECD Guidelines for MNEs clarifies that 'due diligence is understood as the process through which enterprises can identify, prevent, mitigate and account for how they address their actual and potential adverse impacts as an integral part of business decision-making and risk management systems.'³⁹ It further reinforces that the business relationship includes any entity in the supply chain.

The OECD goes even further to provide granular guidance on supply chains in its Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High Risk Areas.⁴⁰ This document 'provide[s] a framework for detailed due diligence as a basis for responsible supply chain management'.⁴¹ The Due Diligence Guidance aims to help companies respect human rights and avoid contributing to conflict through their mineral or metal purchasing decisions and practices in conflict-affected and high-risk areas. However, unlike the UNGPs or the OECD Guidelines for MNEs, the Due Diligence Guidance expressly refers to conflict minerals, i.e. they concern due diligence in a specific industry. The guidance also explicitly includes transparency as a key feature of strong supply management.⁴² The explanation of the process provides important information about how to better understand

³⁶ UN Office of the High Commissioner for Human Rights (OHCHR), *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, UN Doc HR/PUB/12/02 (2012), 6.

³⁷ *Ibid.*, 25 and UN Doc A/HRC/17/31/Add.3, para 10.

³⁸ OHCHR, *Interpretive Guide*, 59.

³⁹ OECD, *Guidelines for Multinational Enterprises* (OECD 2011) para II.14.

⁴⁰ OECD, *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High Risk Areas*, 3d edition (OECD 2016)

<<http://www.oecd.org/daf/inv/mne/OECD-Due-Diligence-Guidance-Minerals-Edition3.pdf>> accessed 25 May 2018 (OECD Due Diligence Guidance).

⁴¹ *Ibid.*

⁴² *Ibid.*, at 17 and 22.

corporate due diligence both generally and in specifically in supply chains. The Guidance defines due diligence in terms of minerals in conflict areas as an ‘on-going, proactive and reactive process through which companies can ensure that they respect human rights and do not contribute to conflict’.⁴³ It further presents a five-step framework for risk-based due diligence in the mineral supply chain: First, companies should establish strong company management systems, including, inter alia, adopting and clearly communicating to suppliers and the public a company policy for the supply chain of minerals originating from conflict-affected and high-risk areas. Second, companies should identify and assess risk in the supply chain; thirdly, they should design and implement a strategy to respond to identified risks; fourthly, companies should carry out independent third-party audit of supply chain due diligence at identified points in the supply chain. Fifthly and finally comes the transparency element, companies should report on supply chain due diligence. The need for transparency is reinforced throughout the ‘Suggested Measures for Risk Mitigation and Indicators for Measuring Improvement’.⁴⁴

c. Summary of Due Diligence in Supply Chains

Across the guidance on supply chains presented above, a common pattern for effective implementation of the due diligence duty can be distilled through the UNGPs and the OECD standards. Though the due diligence frameworks vary slightly, these examples are mutually supportive. Business should first identify and assess the risks in their supply chain. They should then use their findings for developing their internal structures and adopt a strategy for addressing these risks. The due diligence strategies then also suggest that companies assess and verify the outcomes of their due diligence mechanisms. Finally, companies should publicly report about their strategy and its outcomes. Thus transparency serves as the lynchpin demonstrating that the business has carried out each step of due diligence process. The UNGPs and the OECD Guidelines and Guidance deliver comprehensive processes through which a business operations may carry out effective due diligence. They are three examples from the many other CSR frameworks that exist. The most crucial feature that the different CSR frameworks share is that they are not legally enforceable.⁴⁵ However, as will

⁴³ Ibid.

⁴⁴ Ibid., Annex II, 28-9.

⁴⁵ Martin-Ortega n 17, 59; Humberto Cantu Rivera, ‘Negotiating a Treaty on Business and Human Rights: The Early Stages’ (2017) 40 University of New South Wales Law Journal 1200, 1217; Joylon Ford and Claire Methven O’Brien, ‘Empty Rituals or Workable Models?’

be examined in the next section, the transparency standards as supported in the UNGPs and by the OECD are increasingly being incorporated into national legislation and policy.

IV. USING NATIONAL LAW TO PROMOTE SUSTAINABLE SUPPLY CHAINS

For the most part, national law need not take heed of international law as the purpose of public international law is to govern relations between states whilst the purpose of national law is to define the rules and relationships between the state and its citizens or between organs of the state. However, with the introduction of the international human rights law and its concomitant recognition of individuals as rights-bearers under international law, the flaws of this approach became more pervasive. The adoption of human rights treaties (and the implicit inclusion of these in the SDGs) reflects the growing acceptance of individuals as actors in the international legal system.⁴⁶ However, to put the theory of protection of human rights into practice there must be an effective enforcement mechanism in the national legal system. Working through these protections at the various levels of national governance is part of the due diligence performed by states in advance of and subsequent to implementing international human rights obligations.

In terms of protection against human rights abuse by TNCs as third-party non-state actors, the same necessity is true for states' obligations of due diligence. The protection can only be a reality once national law imposes a tangible, legally enforceable obligation on corporations to prevent human rights harm. However, the state is crippled in this endeavour by limitations of jurisdiction and only well-crafted legislation will overcome these hurdles. Terminology becomes important when the subject matter is human rights, a set of obligations owed by the state pursuant to international law, not owed by non-state actors outwith the traditional jurisdiction of the international system. Therefore, it is imperative that national systems legislate and enforce rules protecting against human rights abuse by non-state actors and that

Towards a Business and Human Rights Treaty' (2017) 40 University of New South Wales Law Journal 1223, 1227-8.

⁴⁶ International Covenant on Civil and Political Rights 1966, 999 UNTS 171, entry into force 23 March 1976 (ICCPR); International Covenant on Economic, Social and Cultural Rights 1966, 993 UNTS 3, entry into force 3 January 1976 (ICESCR). The ICCPR and the ICESCR are often referred to as the 'twin Covenants' due to their shared adoption dates and as joint progeny of the UDHR.

they do so by specifically linking international standards to corporate conduct through national law.

In the course of developing supply chains, businesses increase their rights and obligations through contracts which is, for the most part, a straightforward issue of contract law.⁴⁷ As noted above, however, supply chains impact not mere business actors but individuals that generate goods and services, often doing so outside the jurisdiction of the TNC's home state. The following sections explore transparency in two distinct legislative frameworks designed to reconcile certain tensions created by business and human rights interactions.

At present there are a multitude of voluntary soft law initiatives designed to promote responsible supply chain governance. Many initiatives are industry or region specific thus there are many options from which TNCs may choose to guide their CSR policies and practice. As indicated in section 3, for the purposes of examining sustainable supply chains, the UNGPs and the OECD Guidelines for MNEs and Due Diligence Guidance are the most relevant for the present study. Both are designed to apply across variable sectors and articulate that the first step is a meaningful human rights impact assessment. They also underscore that transparency should flow through all steps taken in pursuit of meeting a due diligence duty. Elements of these soft law standards have been incorporated into different national laws through a variety of legislative measures. Transparency is the element focused upon in the following examination of the UK Modern Slavery Act and the US Dodd-Frank Act. This section seeks to ascertain whether the transparency obligations in each of these legislative measures fulfils the demands of effective HRDD.

A. UK Modern Slavery Act

The transparency reporting section of the UK Modern Slavery Act, section 54, is a soft disclosure law.⁴⁸ Section 54 stipulates that every organisation which carries on a business, or is part of a business, in any part of the UK with a total annual turnover of £36 million or more must issue a slavery and human trafficking statement for each financial year. The statement

⁴⁷ On the ability to regulate supply chains through the use of contracts, see Kasey McCall-Smith and Andreas Rühmkorf, 'From International Law to National Law: The Opportunities and Limits of Contractual CSR Supply Chain Governance' in Alexandra Horváthová and Vibe Garf Ulfbeck (eds), *Law and Responsible Supply Chain Management: The Interplay and Overlap of Contract and Tort Law* (forthcoming Routledge 2019).

⁴⁸ Modern Slavery Act 2015, s54.

must describe the organisation's steps to ensure that slavery and human trafficking does not take place in any of its supply chains and its own business or that the organisation has taken no such steps. An important point for the discussion about due diligence here is that the section goes on to enumerate a list of issues that a company 'may include information about'.⁴⁹ Inter alia, this list refers to the company's due diligence processes as one of the issues in this list. It is left to the discretion of business to determine whether and how they report about due diligence.

While it is formally part of what is generally known as legislation on 'nonfinancial information disclosure', it is very light-touch in its approach, in particular with regards to requiring due diligence reporting. These types of disclosure laws refer to due diligence, either in the letter of the law or, at least, in the guidance accompanying the law, and businesses are not required to report about their due diligence mechanisms. Consequently, businesses that are subject to these reporting duties retain maximum discretion regarding the 'if' and the 'how' of their reporting on supply chain due diligence. Even with the latitude in discretion, over 6100 corporations and industry organisations have filed modern slavery statements in an effort to address the issue of slavery and trafficking in supply chains.⁵⁰ This demonstrates that a soft mechanism can compel action even if only approximately 19 percent of those statements are viewed as meeting the minimum requirements for compliance.⁵¹ Therefore, while this transparency measure aims to ensure that UK corporations' supply chains are free of slavery and human trafficking, it lacks a strong compliance trigger and is limited in terms of the scope of the HRDD required.

There is some evidence suggesting that in terms of due diligence, UK TNCs rely on the UK Government for necessary due diligence when it concerns business arrangements outside the UK. A prime example is presented in a case raised with the OECD UK National Contact Point by an NGO against a UK business for failure to contemplate the human rights violations resulting from the sale of munitions to Saudi Arabia. In the case the TNC noted that it understood that the UK government made a human rights assessment of the supplied products in the course of determining whether to grant the export licence, thus suggesting that

⁴⁹ Ibid., s54(5).

⁵⁰ Business & Human Rights Resource Centre, Modern Slavery Registry
<<http://www.modernslaveryregistry.org/>> accessed 25 May 2018

⁵¹ Ibid. The Modern Slavery Registry evaluates the compliance of each statement it registers.

it was the duty of the Government, not the business, to conduct due diligence.⁵² While it is not an express question of due diligence in a supply chain from the top-down, this raises another concern, namely the role of UK companies as contributors to the supply chain that has negative human rights consequences. From a due diligence perspective and its demand to be considered on a case-by-case basis, the example suggests that human rights due diligence was not a key business concern. Additionally, this type of scenario would not trigger a rights abuse addressed by the Modern Slavery Act.

B. US Dodd-Frank Act

In the US, the Dodd-Frank Act provides another example of legislation designed to impose transparency requirements as a means of ensuring and fulfilling due diligence.⁵³ In this instance, the narrow focus is conflict minerals coming from the Democratic Republic of the Congo (DRC) or an adjoining state. In response to widespread acknowledgement of the role that the mining of conflict minerals has played in contributing to the prolonged conflict and high levels of sexual and gender based violence in the DRC, the US, home to a large number of stock-exchange listed companies utilising such minerals, adopted this stringent measure in 2010.⁵⁴ The US conflict minerals measure differs significantly from the soft-touch transparency in the UK Modern Slavery Act. First, it requires companies to exercise due diligence in ascertaining the chain of custody of any potential conflict minerals from the DRC and to certify the process used for this determination to the Securities and Exchange Commission (SEC). The SEC is the authority which enforces securities law in order to protect investors and promote a fair, orderly and efficient market by ensuring that all public

⁵² UK National Contact Point for the OECD Guidelines for Multinational Enterprises, 'Complaint from an NGO against a UK Company' (*GOV.UK*, October 2016) para 18 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/569934/2016_10_17_Initial_Assessment_finalised_for_issue.pdf> accessed 25 May 2018.

⁵³ Dodd-Frank Wall Street Reform and Consumer Protection Act 2010, 12 U.S.C. 5301 et seq., §1502, amending the Securities Exchange Act of 1934, 15 U.S.C. 78m (Dodd-Frank Act). The final rules on its implementation were adopted on 22 August 2012, see Security and Exchange Commission (SEC), 17 CFR Parts 240 and 249b, RIN 3235-AK84, Conflict Minerals, Final Rule (SEC Final Rules) <<https://www.sec.gov/rules/final/2012/34-67716.pdf>> accessed 25 May 2018. For general discussion of Dodd-Frank §1502 see Christiana Ochoa and Patrick J Keenan, 'Regulating Information Flows, Regulating Conflict: An Analysis of United States Conflict Minerals Legislation' (2011) 3 *Goettingen Journal of International Law* 129; Johnathan C Drimmer and Noah J Phillips, 'Sunlight for the Heart of Darkness: Conflict Minerals and the First Wave of SEC Regulation of Social Issues' (2012) 6 *Human Rights & International Legal Discourse* 131.

⁵⁴ *Ibid.*, §1502, para (a).

companies ‘disclose meaningful financial and other information to the public’ which ‘provides a common pool of knowledge for all investors’.⁵⁵ Dodd-Frank resulted in the SEC becoming the policing authority for potential conflict minerals in the supply chain for US stock exchange listed companies. Thus, in addition to being securities law experts, the SEC quickly morphed into recognised experts on conflict minerals and the DRC conflict. The enforcement capacity of the SEC includes the ability to bring civil actions against any individual or corporate actor deemed in breach of securities law and is a strong compliance pull for companies.

Importantly this initiative highlights that the certified audit is a ‘crucial component of due diligence in establishing the source and chain of custody of such minerals’.⁵⁶ For the purposes of this chapter, it is key to note that the final rule implementing §1502 specifically references the OECD due diligence framework.⁵⁷ Secondly, it requires companies to publicly report about the due diligence activities in those situations. This section applies to both listed US companies as well as foreign companies listed at the US stock exchange which use minerals including tantalum, tin, tungsten or gold if the company files reports with the SEC under the Exchanges Act and the minerals are ‘necessary to the functionality or production’ of a product manufactured or contracted to be manufactured by the company. A company that is subject to this duty must conduct a reasonable ‘country of origin’ inquiry that must be performed in good faith and be reasonably designed to determine whether the minerals used in its production can be certified ‘DRC conflict free’.⁵⁸ Where the company knows that the minerals did not originate in any of the countries covered or if it has no reason to believe that the mineral may have originated in the countries then it must disclose this audit process, provide a brief description of its inquiry and the results therefrom. The company must make this description publicly available on its website. Notably, the measure is not designed to stop conflict commerce but to ensure there is enough information available for investors to make informed decisions.⁵⁹

However, where a company knows or has reason to believe that the minerals may have originated in the DRC or adjoining countries then it must undertake due diligence on the

⁵⁵ Securities and Exchange Commission, ‘What We Do’ <<https://www.sec.gov/Article/whatwedo.html>> accessed 25 May 2018.

⁵⁶ Dodd-Frank Act, §1502, para (b).

⁵⁷ SEC Final Rule (referenced throughout).

⁵⁸ Ibid., 11 and fn 25.

⁵⁹ Ochoa and Keenan n 53, 138

source and chain of custody of their conflict minerals. The company is then required to file a Conflict Minerals Report and make this publicly available on its website. If, following its due diligence measures, the company determines the minerals to be ‘conflict free’ (i.e. that they come from one of the covered countries, but did not finance or benefit armed groups) then it must undertake audit and certification requirements in the form of obtaining an independent private sector audit of their Conflict Minerals Report and certify that is obtained such an audit. The audit report must be included in the Conflict Minerals Report and the auditor must be identified. If it finds its products are not ‘conflict free’ then it must release all of the information as in the previous scenario and, additionally, describe the following in its Conflict Minerals Report: the products manufactured or contracted to be manufactured that have not been found to be conflict free, the facilities used to process the conflict minerals, the country of origin of those minerals and the efforts to determine the mine or location of origin. Companies are subject to liability for fraudulent or false reporting on conflict minerals under the Exchange Act.⁶⁰ Anyone who is sued under this provision is not liable if they can demonstrate that they acted in good faith and that they had no knowledge that such statement was false or misleading (the ‘good faith defence’).

The absence of choice regarding both the conduct of due diligence and the reporting about this means that this law is more stringent than that in the soft disclosure category. This approach, however, has come at a cost. Using the SEC to regulate has been called into question by a range of experts.⁶¹ The former SEC Chair Mary Jo White, has been vocal on the point:

Seeking to improve safety in mines for workers or to end horrible human rights atrocities in the Democratic Republic of the Congo are compelling objectives, which, as a citizen, I wholeheartedly share. But, as the Chair of the SEC, I must question, as a

⁶⁰ Securities Exchange Act of 1934, s13(p), 15 U.S.C. 78m.

⁶¹ Karen E Woody, ‘Conflict Minerals Legislation: the SEC’s New Role as Diplomatic and Humanitarian Watchdog’ (2012-13) 81 Fordham Law Review 1315; Laura Seay, ‘What’s Wrong with Dodd-Frank 1502? Conflict Minerals, Civilian Livelihoods, and the Unintended Consequences of Western Advocacy’ (2012) Center for Global Development Working Paper No. 284 <https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2009350> accessed 25 May 2018; Ved P Nanda, ‘Conflict Minerals and International Business: United States and International Responses’ (2014) 20 ILSA Journal of International and Comparative Law 286, 296

policy matter, using the federal securities laws and the SEC's powers of mandatory disclosure to accomplish these goals.⁶²

Furthermore, the practical impact has, according to some, been devastating on the ground in the DRC and resulted in the intended beneficiaries of the act having to choose between different, catastrophic options – mining as part of the conflict minerals chain to survive or starving to death.⁶³

This disclosure-based regulatory approach mandates the exercise of due diligence and appears to be a strong formula for ensuring compliance. Unfortunately, the enforcement provision of the Dodd-Frank Act hangs in the balance following the 2017 decision in *National Association of Manufacturers, et al. v. Securities and Exchange Commission*, which struck down the portion of the rule that demands a chain of custody report under the section 1.01(a) of the final rules as violation of the First Amendment of the Constitution.⁶⁴ The rule in question is that which requires the business to identify minerals in their supply chain with the phrase 'have not been found to be "DRC conflict free"' in its report to the Commission and on the company website if it is unable to certify them as such. In November 2017, the House Committee on Financial Services struck another blow to the viability of Dodd-Frank §1502 by presenting a bill to fully strike the disclosure requirements and thus withdraw any binding accountability mechanism for monitoring conflict minerals used by US-listed companies.⁶⁵ At the moment, the projected outcome of the bill is unclear, however, the recent committee report on the bill underscores how difficult it may be to sustain this check on businesses operating in the DRC, at least in its current incarnation.⁶⁶

⁶² Committee on Financial Services (CFS), Report together with Minority Views on H.R. 4248, Report 115-570, 20 February 2018, 115th Congress, 2d Session, 2 <<https://www.gpo.gov/fdsys/pkg/CRPT-115hrpt570/pdf/CRPT-115hrpt570.pdf>> accessed 25 May 2018.

⁶³ Ibid., 3-4; Woody n 61; Seay n 61.

⁶⁴ *National Association of Manufacturers, et al. v. Securities and Exchange Commission*, 800 F.3d 518; final judgment No. 13-CF-000635 (D.D.C. 3 April 2017). See further Laura Fraedrich, Chase Kariecki and Ruby Balaram, 'Conflict over Conflict Minerals: U.S. Policy Fails First Amendment Test' (2014) 9 Global Trade and Customs Journal 411; Nanda n 61, 295-6.

⁶⁵ H.R. 4248, A Bill to amend the Securities Exchange Act of 1934 to repeal certain disclosure requirements related to conflict minerals, and for other purposes, 3 November 2017, 115th Congress, 1st Session.

⁶⁶ Committee on Financial Services, Report 115-570.

Moreover, the explicit reference to the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas in the Dodd-Frank Act effectively incorporates the due diligence guidance of the OECD into domestic US law. This means that guidance that was developed as non-binding by the OECD at the international level thus becomes one of the primary options for companies that fulfil their statutory duties under the Act. It is expected that many companies will apply this guidance in order to comply with their legal obligations thus there is a high level of implementation of the concept of supply chain due diligence, as understood by international standards. This is remarkable, given that observance to the OECD Guidance is voluntary and not legally enforceable.

Despite the positive aspects of the conflict minerals legislation, its limited applicability to conflict minerals leaves most of the globe and many of the most common forms of abuse in the supply chain unattended. There is no comparable legislation for other aspects of supply chain due diligence such as modern slavery or child labour, breaches of health and safety standards or environmental pollution, all vital to sustainable development. The level of implementation of due diligence in supply chains is therefore high, but in a very specific context.

V. CONCLUSIONS ON THE USE OF TRANSPARENCY TO DELIVER SUSTAINABLE SUPPLY CHAINS

This chapter has analysed the potential of key international due diligence standards to promote sustainable supply chains. It began by clarifying the parameters of sustainability and due diligence before developing these in specific relation to supply chains. The UNGPs and the OECD standards present a common, mutually supportive baseline for effective due diligence in supply chains. The transparency dimension of these standards is the element that most easily lends itself to enforcement through national legislation as it is the lynchpin demonstrating the extent to which a business has carried out each step of the due diligence process. The comprehensive processes set out by the UNGPs and the OECD Guidelines and Guidance offer businesses a roadmap to carrying out effective due diligence.

A key challenge for TNCs is that they may have to comply with a diverse set of national regulations, each of which demands distinct responses and may vary across different aspects of the enterprise. Sustainable supply chain management necessitates comprehensive and flexible HRDD. HRDD policies must, therefore, be flexible enough to respond to the variable requirements of different national laws and policies and simultaneously accommodate future regulatory developments.⁶⁷ Two of these national laws, the UK Modern Slavery Act and the US Dodd-Frank Act were examined as methods of hardening international transparency standards at the national level. Though both pieces of legislation can claim certain levels of success, the analysis demonstrates the need for more extensive joined-up thinking on how to deliver sustainable supply chains in broader terms.

Recalling that HRDD as outlined by the UNGPs and the OECD contains a ‘human’ element it notable that neither the UK nor US legislation examined explicitly holds any practical relief for individuals whose rights may have been harmed as a result of poor supply chain management. There is no clear path for accessing justice in the event that transparency reporting reveals a serious act or omission at any point in the supply chain. The failure to address potential remedies for individuals impacted reinforces the power imbalance between TNCs and the individuals that fuel their supply chains and prohibits the realisation of several SDG targets, including SDG 16 which promotes ‘the rule of law at the national and international levels’ and aims to ‘ensure public access to information and protect fundamental freedoms’. In terms of the specific issues of modern slavery and conflict minerals, progress has been demonstrated albeit in an uneven pace though further progress is no doubt on the horizon. Therefore, the overarching conclusion to this chapter holds that though the duty of businesses to engage in due diligence is far from concrete, international regulations are beginning to consolidate which will undoubtedly lead to further steps in a legal framework designed to secure sustainable supply chains.

⁶⁷ Robert McCorquodale, Lise Smit, Stuart Neely and Robin Brooks, ‘Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises’ (2017) 2 Business and Human rights Journal 195, 204.